

# Summaries of Nebraska Supreme Court and Court of Appeals Decisions on Workers' Compensation Cases

Fiscal Year 2000: July 1, 1999 to June 30, 2000

## ***Supreme Court Cases:***

**1. Levander v. Benevolent, Protective Order of Elks of U.S. of America, 257 Neb. 283, 596 N.W.2d 705 (1999).**

SCOPE OF EMPLOYMENT

SUMMARY JUDGMENT

EXCLUSIVE REMEDY

The Supreme Court reversed the district court's decision to grant defendant's motion for summary judgment finding that the evidence established that a material issue of fact existed as to whether plaintiff was an employee acting in the scope of employment at the time of the accident.

Plaintiff was a member and employee of an Elks lodge who was injured while grilling hamburgers on an outdoor barbecue grill which caught fire. She brought suit against the defendant Elks in district court for negligence and later sought to join the manufacturers of the grill and propane cylinder, the company that filled the propane cylinder and the local branch of the Elks. Defendant moved for summary judgment claiming that it was not a proper party defendant and that the Workers' Compensation Court had exclusive jurisdiction over the matter. The district court entered an order granting summary judgment in favor of defendant and subsequently denied plaintiff's application to join additional party defendants.

On review, the Supreme Court looked at the evidence to determine whether an issue of material fact was raised regarding the status of plaintiff's employment at the time of injury. Plaintiff regularly volunteered her time to defendant by grilling hamburgers and doing other activities before and after she started being paid for opening the clubhouse, bartending, accepting green fees from golfers and cleaning. The evidence established that it was not unusual for members of the lodge to help with grilling at golf tournaments or on "beer and burger nights," and none of the other members were paid during these activities. Defendants relied on *Brown v. Leavitt Lane Farm*, 215 Neb. 522, 340 N.W.2d 4 (1983), to claim that even if plaintiff was acting as a volunteer, she was acting within the scope of employment. In *Brown*, the Court found that a volunteer was injured within the scope of his employment because he was in the process of assisting coworkers perform work for the employer and the labor was done in a good-faith attempt to assist fellow employees. The Court found the instant case distinguishable because 1) plaintiff was not physically assisting a coworker but rather filling in for someone who was not there; 2) grilling hamburgers had never been a part of the scope of her employment at the Elks; and 3) the job plaintiff was doing was strictly understood to be a part of her volunteer work as a member of the lodge, as opposed to providing assistance to coworkers. As there was a material issue of fact whether plaintiff was an employee acting in the scope of employment at the time of the accident, the Court reversed and remanded for further proceedings, noting that it would be an abuse of discretion to deny plaintiff's application to add an additional party defendant.

## **2. Hagelstein v. Swift-Eckrich Div. of ConAgra, 257 Neb. 312, 597 N.W.2d 394 (1999).**

### **REVIEW PANEL QUORUM**

The Supreme Court dismissed plaintiff's appeal of the decision of the compensation court's review panel for lack of jurisdiction and remanded the cause for further proceedings. The Supreme Court ruled that two compensation court judges were insufficient to satisfy the statutory quorum requirement for appellate review due to the death of the panel's third judge before he participated in the review panel's decision.

Plaintiff's original brief assigned error to the compensation court's failure to have a third judge sign the order of affirmance. Plaintiff filed a second amended brief that purported to withdraw arguments regarding this error. The Supreme Court found that the withdrawal of plaintiff's argument did not resolve the issue and because the participation of only two judges in the decision of the review panel raised jurisdictional issues, the Supreme Court was bound by duty to consider them.

Taking judicial notice of the fact that the third judge assigned to the review panel participated in oral argument but died before a decision was rendered, the Supreme Court relied upon *Commonwealth v. Petrillo*, 340 Pa. 33, 16 A.2d 50, (1940) for its holding. *Petrillo* held that "the death, disqualification or absence of a judge will not deprive the surviving or remaining judges of authority to hold court and transact the business of the court . . . provided, however, that the number of the court is not reduced below that legally required for the transaction of its business." (Emphasis supplied by Nebraska Supreme Court.) (*Id.* at 48, 58.)

Citing §48-156, the Supreme Court held that the plain and ordinary meaning of the quorum requirement is that the review of a disputed claim must be conducted by no less than three judges. Reviewing case law from around the country, the Supreme Court concluded that the very purpose of multi-judge panels is to seek the input and opinion of experienced jurists during the critical juncture of an appellate case - the actual adjudication of the issues of law and fact. It does not suffice to have the adjudication of two judges under §48-156. The Supreme Court further stated that §48-185 and the holding in *Schmidt v. Shoftstall Alfalfa*, 239 Neb. 248, 475 N.W.2d 523 (1991) dictate that the statutes as currently written do not provide for appeal to the Supreme Court or the Court of Appeals without a properly constituted review by the compensation court.

### **3. Thompson v. Kiewit Const. Co., 258 Neb. 323, 603 N.W.2d 368 (1999).**

FINAL APPEALABLE ORDER

SUBSTANTIAL RIGHT

FUNCTIONAL CAPACITY EVALUATION

The Supreme Court affirmed the compensation court's decision that the trial court's order to compel was a non-final, non-appealable order. Therefore, the Supreme Court held it lacked jurisdiction to hear the appeal from the compensation court's finding that an employee could be compelled to attend a functional capacity evaluation (FCE) performed by a physical therapist rather than a physician.

The Supreme Court reasoned that pursuant to §§48-179 and 48-182, appeals from the compensation trial court to the review panel must be from final orders. Because §§48-179 and 48-182 do not define final order, the Supreme Court looked to the three definitions of final order in §25-1902. The Supreme Court found that the trial court's order to compel was neither the first definition of §25-1902, an order that determines an action or prevents a judgment, nor the second definition, an order made on summary application in an action after judgment. The Supreme Court relied on the third definition which concerns an order affecting a substantial right made during a special proceeding.

The Court found that the plaintiff did not identify any substantial right which was affected by the compensation court's order that plaintiff attend the FCE arranged by defendant. Plaintiff admitted the defendant had a statutory right to have him evaluated, but argued that the FCE should only be administered by a certain type of medical professional. The Supreme Court held that such challenge to the type of medical professional did not rise to the level of a substantial right and dismissed plaintiff's appeal for lack of jurisdiction.

#### **4. Jordan v. Morrill County, 258 Neb. 380, 603 N.W.2d 411 (1999).**

ACCIDENT

REPETITIVE TRAUMA

STANDARD OF REVIEW

The Supreme Court affirmed the review panel's finding that plaintiff had not sustained a work-related accident and injury to his right shoulder because plaintiff had missed no time from work, thereby failing to satisfy an essential element of an accidental injury.

The trial court found that plaintiff sustained an injury to his right shoulder due to constant repetitive trauma from operating a road grader in June 1996. The review panel determined that the evidence suggested plaintiff did not seek medical attention for his claimed right shoulder injury until October 1996, thus the trial court's finding of a June 1996 accident was clearly wrong. In addition, the review panel noted that the trial court found plaintiff had missed no time from work. The review panel majority concluded plaintiff had not experienced an interruption or discontinuation of employment, an essential element of an accidental injury. For these reasons, the review panel reversed and dismissed the case.

The Supreme Court found that the evidence supported the trial court's determination that plaintiff did tell his treating physician of his right shoulder problems in June 1996, although at that time, his physician thought the problem was residual to a previous surgery rather than a repetitive trauma injury. According to the Court, a worker is not required to know the causation of his condition at the time he sees a doctor for treatment. By substituting its view of the facts for that of the trial court, the review panel had acted in excess of its powers. The Court next reviewed the essential elements of the statutory definition of an accident, i.e., that the injury must be unexpected or unforeseen, the accident happen suddenly and violently, and that the accident must produce at the time objective symptoms of an injury. *Sandel v. Packaging Co. of America*, 211 Neb. 149, 317 N.W.2d 910 (1982). The review panel had reversed the decision of the trial court based on the second element. Citing *Frank v. A & L Insulation*, 256 Neb. 898, 594 N.W.2d 586 (1999), the Supreme Court reiterated that for purposes of the Nebraska Workers' Compensation Act, "suddenly and violently" does not mean instantaneously and with force. Rather, the element is satisfied if the injury occurs at an identifiable point in time requiring the employee to discontinue employment and seek medical treatment. Since plaintiff had not missed time from work in addition to seeking medical treatment, the review panel correctly determined plaintiff had not experienced an interruption or discontinuation of employment. As plaintiff failed to satisfy the second element of the statutory definition of an accident, the trial court's finding that plaintiff suffered a work-related accident was in error as a matter of law. The Court added that to the extent that *Maxson v. Michael Todd & Co.*, 238 Neb. 209, 469 N.W.2d 542 (1991) and *Vencil v. Valmont Indus.*, 239 Neb. 31, 473 N.W.2d 409 (1991) are interpreted to mean that the phrase "interruption of employment" means something other than the discontinuation of employment, they are disapproved.

## **5. Austin v. Scharp, 258 Neb. 410, 604 N.W.2d 807 (1999).**

### **SUBROGATION**

#### **NOTICE**

The Supreme Court reversed the district court, finding that it had erred in its application of §48-118. The case was remanded for a determination of the amount to be reimbursed to plaintiff and his attorney from a third-party settlement.

Plaintiff was in the course of his employment with Andy's Tires Inc. (Andy's) when he was struck by a third party (Scharp). Plaintiff was paid workers' compensation benefits by Andy's insurance carrier, Cincinnati Insurance Company (Cincinnati). Plaintiff then pursued a third-party claim against Scharp and attempted to settle with Scharp. When unsuccessful, plaintiff filed a claim in district court. Cincinnati hired an attorney and Andy's filed an answer in district court. Plaintiff and Scharp sent some, but not all discovery and other documents to Andy's. Andy's responded to two sets of interrogatories, but did not do any discovery or other trial preparation. Plaintiff and Scharp then participated in mediation to resolve the dispute. The claims representative for Cincinnati was notified, but Andy's was not notified. A settlement was reached without participation of Cincinnati or Andy's.

Meanwhile, the district court dismissed the case due to lack of progression. The case was then reinstated to determine what portion of plaintiff's fees and expenses should be payable out of the settlement to which Andy's and Cincinnati were entitled by virtue of their subrogation rights. The district court held that Andy's and Cincinnati had no obligation to pay attorney fees and costs out of the recovery and that the entire amount deposited with the court should be paid to Cincinnati. The district court also held that §48-118 gave Andy's the option of moving to have the settlement declared void or seeking its approval as made, without imposition of attorney fees. The district court stated that Andy's and Cincinnati chose the latter option and the district court was bound by statute to enforce that choice. Plaintiff appealed, claiming the district court erred on several grounds, including the issue of Andy's participation in the lawsuit.

The Supreme Court held that the answer filed by Andy's was a waiver of the notice required by §48-118, and that while Andy's did not receive notice of all of the discovery proceedings, Andy's had actual notice of the lawsuit. In addition, the Supreme Court found that Andy's did not participate in the third-party suit. The Supreme Court stated that after becoming a party to the action, Andy's had an "equal voice" in its prosecution and had every right to seek relief against Scharp and take all steps normally associated with the prosecution of a civil claim. Andy's failed to do so; therefore it was subject to the mandatory directive of §48-118 that such conduct "shall waive any and all claims or causes of action for improper prosecution of such suit or inadequacy of a settlement . . . and the party bringing the claim or prosecuting the suit shall be entitled to deduct from any amount recovered the reasonable expenses of making such recovery, including a reasonable sum for attorney's fees . . . ." The Supreme Court went on to state that if Andy's believed the conduct of plaintiff was prejudicial to its subrogation interest, it could have invoked the provision of §48-118 which authorizes the district court to declare as void a settlement between an injured employee and a third party if it is not agreed to in writing by the employer or its insurer. The Supreme Court stated that where an employer elects not to utilize this remedy, §48-118 does not permit the employer to realize the benefit of recovery of its subrogation interest without sharing the cost of obtaining that recovery.

**6. Harmon v. Irby Const. Co., 258 Neb. 420, 604 N.W.2d 813 (1999).**

PERMANENT TOTAL DISABILITY

VOCATIONAL REHABILITATION

AVERAGE WEEKLY WAGE

ATTORNEY FEES

The Supreme Court affirmed the compensation court's finding that plaintiff was not required to relocate in order to find employment and that plaintiff was permanently totally disabled. The case was remanded, however, for recalculation of the average weekly wage and for determination of reasonable attorney fees.

Plaintiff was employed by defendant as a lineman and had relocated to Nebraska six days prior to his low back injury. The project in Nebraska provided for a \$30 per diem payment. According to the loss of earning capacity report in evidence, plaintiff sustained a 75 to 80 percent loss of earning capacity. The trial court awarded plaintiff permanent total disability benefits because of plaintiff's physical restrictions, minimal education, lack of other training or skills, and the depressed labor market in the Superior, Nebraska area. The trial court also calculated plaintiff's average weekly wage by adding the amount of the per diem to each day of the 26-week period. In addition, an attorney fee of \$3,904 was awarded by the trial court for defendant's failure to pay a \$165 medical bill.

On appeal, defendants argued that the compensation court erred in finding that plaintiff was permanently totally disabled and that his refusal to relocate did not constitute a failure to comply with the court-approved vocational rehabilitation plan for job placement. Plaintiff cross-appealed arguing that the compensation court erred in reversing the trial court's calculation of average weekly wage and award of attorney fees. The Supreme Court found sufficient evidence in the record to affirm the award of permanent total disability benefits. The Court noted that a determination of what things might be considered in assessing disability involves statutory construction and thus is a question of law. See *City of Omaha v. Morello*, 257 Neb. 869, 602 N.W.2d 1 (1999). Plaintiff could not be required to move to find employment and the Court agreed with the compensation court that plaintiff's refusal to move was not a factor which may be considered in assessing the degree of a claimant's disability. In regard to the plaintiff's average weekly wage, the Court affirmed the review panel's finding that applying the \$30 per diem to each day of the 26 weeks preceding the injury distorted the calculation of plaintiff's average weekly wage. Instead, the Court held \$30 per diem should be considered income only for the six days which plaintiff actually earned it, and remanded to the trial court for a recalculation. Finally, pursuant to Neb.Rev.Stat. §48-125 (Reissue 1998), an award of attorney fees must be calculated on a case-by-case basis. In this case, the Court agreed with the review panel's finding that only a fraction of the documented hours spent by plaintiff's attorney could be directly attributed to collection of the unpaid medical bill. The Court pointed out that defendants made timely medical payments in excess of \$50,000.00 before the case came to trial, and concluded that allowing a claimant to recover all of his or her attorney fees based on the failure of a defendant to pay one bill would provide the claimant with a windfall. Therefore, the review panel's order that attorney fees be recalculated was affirmed.

**7. Sheldon-Zimbelman v. Bryan Memorial Hosp., 258 Neb. 568, 604 N.W.2d 396 (2000).**

TEMPORARY TOTAL DISABILITY

VOCATIONAL REHABILITATION

STATUTORY LIMITATION ON BENEFITS

RETROACTIVE AWARD

The Supreme Court affirmed the compensation court's finding that defendant was entitled to credit plaintiff's temporary benefits during vocational rehabilitation against the 300-week statutory limitation on permanent partial disability benefits and affirmed the finding that the trial court was in error as a matter of law when it retroactively awarded plaintiff temporary total disability benefits for a period of incapacity.

The plaintiff argued that the disability benefits a claimant is paid while undergoing vocational rehabilitation are not "temporary total disability" benefits that in general are credited against the 300 weeks of partial disability payments provided for under §48-121(2). That section provides, "For disability partial in character . . . This compensation shall be paid during the period of such partial disability but not beyond three hundred weeks. Should total disability be followed by partial disability, the period of three hundred weeks mentioned in this subdivision shall be reduced by the number of weeks during which compensation was paid for such total disability." The Supreme Court disagreed and using rules of basic statutory construction held that benefits received during vocational rehabilitation under §48-121(5) may be and in the instant case were "temporary total disability" benefits, a species of benefits that are considered within §48-121(2). The Supreme Court cited the cases wherein on numerous occasions it described the benefits which a claimant was receiving while undergoing vocational rehabilitation under §48-121(5) as "temporary total disability" benefits, not merely as "temporary disability" benefits or "total disability" benefits. See, e.g., *Gibson v. Kurt Mfg.*, 255 Neb. 255, 583 N.W.2d 767 (1998); *Thach v. Quality Pork International*, 253 Neb. 544, 570 N.W.2d 830 (1997); *Bindrum v. Foote & Davies*, 235 Neb. 903, 457 N.W.2d 828 (1990); *Thom v. Lutheran Medical Center*, 226 Neb. 737, 414 N.W.2d 810 (1987). The Supreme Court so ruled because a claimant pursuing vocational rehabilitation may do so to the exclusion of employment and because under such circumstances, the disability is total. At the same time, the disability is temporary because such vocational rehabilitation is designed to result in future employability.

In addition, the Supreme Court held that the trial judge erroneously awarded plaintiff temporary total disability benefits that antedated the filing of her second petition. The original award determined plaintiff had been at maximum medical improvement and was no longer entitled to temporary benefits except to the extent she participated in vocational rehabilitation. The second award granted plaintiff a period of temporary total disability payments during a period prior to the filing of the second petition. The Supreme Court found the trial judge was without statutory authority to modify the original award and the review panel was correct in reversing the trial court's decision because the plaintiff did not seek a modification under §48-141 due to a change in incapacity and because a modification of the 1994 award was unavailable to this plaintiff in 1998 under the 10-day provision of §48-180. The Supreme Court noted that it disapproved the case upon which the plaintiff was relying, *Bennett v. J.C. Robinson Seed Co.*, 7 Neb.App. 525, 583 N.W.2d 370 (1998), to the extent that the case implied that a retroactive award was possible.

## **8. Collins v. General Casualty, 258 Neb. 852, 606 N.W. 2d 93 (2000).**

### **LOSS OF EARNING POWER**

### **VOCATIONAL REHABILITATION**

### **WILLFUL NEGLIGENCE**

The Supreme Court affirmed the review panel's finding that the trial judge erred in speculating what plaintiff's loss of earning power would be after completion of vocational rehabilitation. The Supreme Court also upheld the compensation court's findings that plaintiff was not willfully negligent and was entitled to vocational rehabilitation benefits.

Plaintiff sustained a back injury in 1991 and was placed on work restrictions in 1992. However, plaintiff continued working as a laborer in the construction industry and exceeding his work restrictions until he injured his back again in 1997. Defendants argued that plaintiff was willfully negligent because he knowingly worked in jobs that were outside his physical restrictions. The Supreme Court stated that in order to avoid liability under §48-101, an employer must prove a deliberate act knowingly done or at least such conduct as evidences a reckless indifference to the employee's own safety. Mere negligence is not enough. See *Krajeski v. Beem*, 157 Neb. 586, 60 N.W. 2d 651 (1953). Plaintiff worked outside his physical restrictions for five-and-a-half years with no significant adverse effects. The Supreme Court agreed with the trial judge that these facts did not constitute willful negligence and held that the trial court's findings were not clearly wrong.

Regarding plaintiff's loss of earning capacity, defendants argued that the review panel erred in requiring that such assessment be determined without considering the benefits of vocational rehabilitation. The Supreme Court stated that once plaintiff had reached maximum medical improvement, the trial judge was obligated to determine his loss of earning power. See *Gibson v. Kurt Mfg.*, 255 Neb. 255, 583 N.W. 2d 767 (1998). Therefore, the review panel was correct in concluding that the trial judge erred in speculating what would be the result of vocational rehabilitation by determining loss of earning capacity before completion of the plan.

Finally, defendants argued that the compensation court erred in awarding vocational rehabilitation benefits. Defendants claimed that because plaintiff waived his opportunity to receive vocational rehabilitation following his 1991 injury, they should not be required to pay for those benefits now. The Supreme Court stated that this argument had no merit and the trial judge correctly determined that plaintiff had sustained a compensable injury rendering him unable to return to his construction occupation. Therefore, the award of vocational rehabilitation benefits was not clearly wrong.



**9. Torres v. Aulick Leasing, Inc., 258 Neb. 859, 606 N.W.2d 98 (2000).**

**COURSE OF EMPLOYMENT**

**GOING AND COMING RULE**

**REASONED DECISIONS**

The Supreme Court reversed and remanded with directions for the compensation court to enter an order complying with Rule 11 of the Workers' Compensation Court Rules of Procedure and taking into consideration the going to and from work rule as applied to the facts of the instant case.

Plaintiff was an over-the-road driver and his employment required him to work at job sites for extended periods of time. If the job lasted less than 30 days, employees were allowed to take their trucks to return to their homes on weekends. If the job lasted more than 30 days, employees were required to use their personal vehicles to return home. Plaintiff was on a job expected to last four to five months and was at the site for approximately one month when he was injured in his personal vehicle while returning to the job site from a weekend trip home.

The trial judge dismissed with prejudice plaintiff's petition seeking worker's compensation benefits, stating: "I leave it to the appellate courts to decide whether or not a job site, which lasts three to four months, constitutes a fixed place of employment. If it does constitute a fixed place of employment then the plaintiff would not be entitled to workers' compensation benefits. If it does not constitute a fixed place of employment then the plaintiff would be entitled to workers' compensation benefits." The review panel concluded it was "implicit" in the order of dismissal that the trial judge found plaintiff did not have a fixed place of employment, and affirmed the dismissal of the petition. Plaintiff appealed, stating that the court erred in finding that he had a fixed place of employment, that he was not a commercial traveler, and that the special errand exception to the going to and from work rule did not apply.

The Supreme Court found that it was precluded from reviewing whether plaintiff was injured during the course of his employment by the fact that the issue was not decided by the trial judge. An appellate court cannot consider an issue on appeal that was not passed upon by the trial court. See *In re Interest of Sunshine A. et al.*, 258 Neb. 148, 602 N.W.2d 452 (1999). The Supreme Court stated that Rule 11 clearly requires explicit findings of fact and conclusions of law so that all interested parties and a reviewing court can determine the legal and factual basis upon which a decision is made. Without such findings, there can be no meaningful appellate review. See *Owen v. American Hydraulics*, 254 Neb. 685, 578 N.W.2d 57 (1998).

**10. Owen v. American Hydraulics, Inc., 258 Neb. 881, 606 N.W.2d 470 (2000).**

ACCIDENT

INDEPENDENT MEDICAL EXAMINATION

REASONED DECISIONS

This was the second appearance of this case before the Supreme Court. The Court affirmed the finding by the trial judge and review panel that plaintiff sustained a compensable injury, but reversed the remainder of the review panel's order.

Plaintiff claimed repetitive trauma injuries to his upper extremities due to his job as a welder. Contradictory medical evidence was adduced at trial. The trial court stated that it could not determine, without speculation, the exact nature of plaintiff's injury and ordered that defendants make application for an independent medical examination (IME) to address causation and the extent of plaintiff's permanent disability. When first before the Supreme Court, the Court agreed with the review panel's determination that Rule 63 of the Workers' Compensation Rules of Procedure and §48-134 require that the trial court establish liability before an IME can be appointed. The Court also affirmed the panel's finding that the trial court's order was ambiguous and that it must enter an order in conformity with Rule 11 requiring reasoned decisions. On remand, the trial judge found plaintiff's repetitive trauma injuries to be compensable and awarded certain benefits. The judge reserved finding on permanent impairment. On the second appeal, the review panel affirmed the trial court's finding that a compensable accident had occurred. The panel remanded the case, however, for further findings consistent with the first award as the trial judge had made factual findings on issues he was previously unable to resolve without speculation. The panel also suggested an IME would now be an option. Defendants again appealed to the Supreme Court, arguing that the trial court and review panel erred in finding liability when the trial judge concluded in his first award that he was unable to make such a finding without resorting to guesswork. Defendants also argued that the review panel erred by authorizing the trial court to appoint an IME because that issue was not before the panel on appeal.

The Supreme Court held that the issue on appeal was not whether the trial judge's order on remand was inconsistent with the original award, but whether it was supported by the evidence. The Supreme Court stated that because this case was pled and tried as an accidental injury case, it would be analyzed as such on appeal. The trial court's finding of a compensable repetitive trauma injury was not clearly wrong because there was sufficient evidence to support it. The Court further found that because there was competent evidence to support the trial judge's decision, the review panel had exceeded its authority under §48-179 when it remanded the case with a suggestion that an IME be ordered. The Supreme Court expressed no opinion as to whether an IME may be utilized with respect to the issues on which the trial judge had reserved ruling. The trial court's finding of a compensable injury was therefore upheld and the case remanded accordingly.

## **11. Combined Insurance v. Shurter, 258 Neb. 958, 607 N.W.2d 492 (2000).**

### **SUBROGATION**

### **ATTORNEY FEES**

The Supreme Court reversed and remanded for further proceedings a district court's decision that the employer had no subrogation rights to the employee's \$75,000 settlement from the alleged third-party tort-feasor.

The district court dismissed the employer's petition for declaratory judgment on its subrogation interest. The district court cited §48-118 which provides that the employee may recover any amount which the employee "should have been entitled to recover." In this case, the district court reasoned that because the statute of limitations had run on the employee's tort claim, the employee was not "entitled to recover" from the alleged tort-feasor. The district court held that because the employee was not "entitled to recover," the employer had no subrogation interest even in a settlement.

The Supreme Court disagreed stating that on the date of the employee's injury, the third party was potentially liable and the employer's subrogation rights vested. The employer's interest was not extinguished when the employee asserted the claim against the tort-feasor after the expiration of the limitations period. The Supreme Court also addressed the issue of attorney fees and ruled that where an employer unequivocally sought to share in settlement proceeds, the employer waived any objection to lack of notice under §48-118. See *Versch v. Tichota*, 192 Neb. 251, 253, 220 N.W.2d 8, 10-11 (1974).

**12. Bottolfson v. Bag 'N Save, Inc., 259 Neb. 124, 608 N.W.2d 171 (2000).**

TEMPORARY TOTAL DISABILITY

VOCATIONAL REHABILITATION

STATUTORY LIMITATION ON BENEFITS

The Supreme Court affirmed the compensation court's finding that defendant was entitled to credit plaintiff's temporary benefits against the 300-week statutory limitation on permanent partial disability benefits.

Relying on the recently decided case of Sheldon-Zimbelman v. Bryan Memorial Hosp., 258 Neb. 568, 604 N.W.2d 396 (2000), the Supreme Court reiterated that because benefits received during vocational rehabilitation under §48-121(5) may and in this case were temporary total disability benefits, a species of temporary total disability benefits, and because they were followed by partial disability benefits, pursuant to §48-121(2), the 300-week period must be reduced by the number of weeks during which compensation was paid for such total disability. The Court recognized again that §48-121(2) provides "For disability partial in character . . . This compensation shall be paid during the period of such partial disability but not beyond three hundred weeks. Should total disability be followed by partial disability, the period of three hundred weeks mentioned in this subdivision shall be reduced by the number of weeks during which compensation was paid for such total disability."

The Supreme Court found that the defendant had paid plaintiff a total of 300  $\frac{2}{7}$  weeks in temporary total and permanent partial disability benefits and therefore had paid the 300-week statutory limitation on workers' compensation benefits under §48-121(2).

### **13. Ramsey v. State, 259 Neb. 176, 609 N.W.2d 18 (2000).**

#### **AVERAGE WEEKLY WAGE**

The Supreme Court affirmed the review panel's finding that the trial court erred in its application of Neb. Rev. Stat. §48-126 and §48-121(4) for purposes of calculating plaintiff's average weekly wage.

Plaintiff was a full-time employee and had received an hourly rate increase during the 26 weeks prior to the date of her work-related injury. In calculating plaintiff's average weekly wage for permanent partial disability benefits, the trial court multiplied her hourly wage at the time of injury by a 40-hour work week, as calculated under §48-121(4). Defendant appealed, arguing that the calculation found in §48-121(4) is applicable only where the 26-week prior wage history calculation is based on work weeks of less than 40 hours, such as in the case of a permanently disabled part-time employee. The review panel reversed the trial court, holding that the average weekly wage was correctly calculated under §48-126 using the 26-week wage history prior to the date of injury.

The Supreme Court noted that the determination of how the average weekly wage of a workers' compensation claimant should be calculated is a question of law, citing *Harmon v. Irby Constr. Co.*, 258 Neb. 420, 604 N.W.2d 813 (1999). Plaintiff argued that the average weekly wage is determined by first making the 26-week wage history calculation required by §48-126. However, because of language in that statute stating, "except as provided in sections 48-121 and 48-122," plaintiff asserted that the court must then look to §48-121(4) which requires that the average weekly wage be calculated again by multiplying the hourly wage earned by the employee at the time of the accident by 40 hours. Plaintiff argued that this second calculation under §48-121(4) establishes a minimum, or floor for the average weekly wage which must be used if the result is a higher wage than calculated under §48-126 using the 26-week wage history. Plaintiff also relied on *McGowan v. Lockwood Corp.*, 245 Neb. 138, 511 N.W.2d 118 (1994) in support of her position, which states, "[a]ll calculations to be made under the provisions of §48-121, and amendments thereto, have reference to wages, percentages, and results as of the time of injury." (Emphasis in original.)

The Supreme Court disagreed, stating that it could find no language in §48-121(4) which would require a distortion of the average weekly wage computation by the application of an hourly rate which was not actually in effect during any portion of the 26 weeks used to calculate the average weekly wage. For hourly employees, §48-121(4) alters the average weekly wage calculation under §48-126 only to the extent that it requires a minimum of 40 hours per week to be utilized in making the calculation. The record reflected that plaintiff worked at least 40 hours in each of the 26 weeks preceding her injury. Therefore, the Supreme Court agreed with the review panel's reading of the statutes in concluding that computation of the average weekly wage under §48-126 using plaintiff's 26-week wage history prior to the date of injury was correct.

#### **14. Miller v. E.M.C. Ins. Companies, 259 Neb. 433, 610 N.W.2d 398 (2000).**

##### REASONABLE MEDICAL EXPENSES

##### SECOND INJURY FUND

##### WAITING-TIME PENALTY

The Supreme Court upheld the compensation court's award of permanent total disability benefits and order for payment of modifications to plaintiff's home, but found error in the lower court's apportionment of liability between the defendant-insurance carrier (E.M.C.) and the Second Injury Fund (Fund), and in its failure to hold the Fund liable for waiting-time penalties.

Plaintiff was self-employed as a dental laboratory technician and sustained a work-related injury in 1993 to his upper back and extremities. He sustained a second work-related injury in 1994 to his right shoulder. Plaintiff had a pre-existing injury due to a car accident in 1958 which left him partially paraplegic and in need of a wheelchair or walker to get around. Two physicians recommended surgery to plaintiff's shoulder, but E.M.C. instructed its medical case manager to put plaintiff's case on hold. Surgery was later authorized, but too late to achieve repair according to one doctor. The trial court found plaintiff to be permanently totally disabled and apportioned 20 percent of the liability to E.M.C., and 80 percent to the Fund. E.M.C. was also ordered to pay for expenses incurred in modifying plaintiff's home, and was found liable for waiting-time penalties on unpaid indemnity benefits, and attorney fees.

On appeal, E.M.C. claimed plaintiff's right shoulder injury was separate and distinct and that its liability should be limited to permanent partial disability benefits based on the 10 percent right upper extremity rating plaintiff received. The Fund argued that since plaintiff sustained a scheduled member injury which did not occur at the same time his preexisting condition arose, or because the scheduled member injury did not independently affect plaintiff's whole body, the Fund could not be liable. See *Eichorn v. Eichorn Trucking, Inc.*, 3 Neb.App. 795, 532 N.W.2d 345 (1995). The Supreme Court agreed with the review panel's conclusion that there is no limit on the type of disabilities which may be combined for purposes of establishing the Fund's liability. See *Crippen v. Max I. Walker*, 6 Neb.App. 289, 572 N.W.2d 97 (1997). The review panel was also correct in finding that a scheduled member injury can be apportioned in terms of a whole person. See *Norris v. Iowa Beef Processors, Inc.*, 224 Neb. 867, 880, 402 N.W.2d 658, 668 (1987). Because there was sufficient evidence to support the trial court's award of permanent total disability, the Supreme Court determined the trial judge was not clearly wrong with respect to that finding. After a review of the medical opinions, however, the Court determined that the apportionment of liability was incorrect and should have been 90 percent to the Fund and 10 percent to E.M.C.

Regarding penalties and attorney fees, plaintiff argued the compensation court erred in apportioning a waiting-time penalty against E.M.C. but in failing to assess any such penalty against the Fund. The Supreme Court agreed, expressly finding that the Fund is an employer for purposes of attorney fees under §48-125(1) and that penalties should have been apportioned accordingly. E.M.C. was determined to be liable for 10 percent of the penalties from the date they had notice of plaintiff's disability, and the Fund for 90 percent.

Finally, the Supreme Court affirmed the compensation court's order that E.M.C. pay for modifications to plaintiff's home pursuant to §48-120(1) noting that the modifications were medical expenses "required by the nature of the injury" and would "relieve pain or promote and hasten the employee's restoration to health and employment".

**15. Hobza v. Seedorff Masonry, Inc., 259 Neb. 671, 611 N.W.2d 828 (2000).**

**PERMANENT PARTIAL DISABILITY**

**WAITING-TIME PENALTIES**

The Supreme Court reversed the compensation court's finding that permanent partial disability benefits should be computed from the date of the permanent disability rating, but affirmed the determination that plaintiff was not entitled to waiting-time penalties.

Plaintiff suffered an injury arising out of and in the course of his employment with defendant. When plaintiff was not receiving temporary total and temporary partial disability benefits after the date of injury, he was working full time. Upon notice, defendants paid permanent partial disability benefits beginning from the date a physician issued a disability rating for plaintiff, rather than from the date of injury. Plaintiff filed a petition claiming he was entitled to permanent partial disability from the date of injury pursuant to §48-119 and sought waiting-time penalties, interest and attorney fees for all payments past due from the date of injury. The compensation court looked to §48-121 to conclude that plaintiff was not entitled to permanent benefits until he reached maximum medical improvement. Therefore the payments for permanent partial disability were timely made and no waiting-time penalties were awarded.

On review, the Supreme Court determined that the plain language of §48-119 requires that permanent partial disability benefits be computed from the date of injury. In response to the review panel's reliance upon section 48-121(3) which provides that "compensation for temporary disability benefits shall cease as soon as the extent of the permanent disability is ascertainable," the Supreme Court found that this language merely provides when compensation ends, rather than when it begins. Therefore, plaintiff was entitled to a lump-sum payment for permanent disability for any weeks during which he did not receive temporary disability benefits. Regarding penalties, the Court held that a reasonable controversy existed since the Court had never before directly addressed the date from which permanent partial disability is computed when an employee has been receiving temporary disability benefits. As this question of law had not been previously answered, plaintiff was not entitled to waiting-time penalties, interest or attorney fees.

Two justices of the Court dissented, agreeing with the review panel majority that §48-119 merely defines the waiting period prior to eligibility for benefits. An injured worker cannot fluctuate repeatedly between permanent and temporary disability status with respect to the same scheduled injury, and the majority's decision to pepper payments of permanent disability while he was temporarily disabled is illogical and not in accordance with the linear progression anticipated by the statutes.

## ***Court of Appeals Cases (Designated for Permanent Publication):***

### **1. *Mendoza v. Pepsi Cola Bottling Co.*, 8 Neb.App. 778, 603 N.W.2d 156 (1999).**

ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT

#### STANDARD OF REVIEW

The Court of Appeals reversed the review panel and upheld the trial court's finding that plaintiff was injured in the course of his employment on or about a certain date.

In the petition, plaintiff alleged the date of his work-related left knee injury to be December 16, 1996. Defendant denied that plaintiff was working on December 16, 1996. After the evidence was received at trial, plaintiff was allowed to amend his petition to change the date of injury to January 5, 1997. At trial, plaintiff testified that he was uncertain of the date of injury but stated that he saw a physician on the day after the accident. The physician's records indicated plaintiff was seen on a Monday. The trial court found that plaintiff had sustained a left knee injury arising out of and in the course of his employment on January 5, 1997, even though there was evidence that plaintiff did not work on weekends. The review panel took judicial notice that January 5, 1997 was a Sunday and concluded that the evidence indicated plaintiff could not have been working on January 5, 1997 and reversed the trial court's decision.

The Court of Appeals first addressed defendant's contention that the review panel sits as a fact finder and its decision should not be overturned unless clearly erroneous, citing *Larson v. Hometown Communications, Inc.*, 248 Neb. 942, 540 N.W.2d 339 (1995). The Court reaffirmed that the trial judge of the Workers' Compensation Court is the finder of fact and that the review panel performs the first level of appellate review. The panel can reverse only if the trial judge was clearly wrong on the evidence or if the decision was contrary to law. In the instant case, the Court held that the date of plaintiff's injury was a question of fact to be determined by the fact finder, and the contradiction in the evidence was resolved by the trial judge in favor of the plaintiff. The review panel's order of reversal, however, was premised solely on its finding that the accident could not have happened on the date alleged, which amounted to the panel substituting its view of the evidence over that of the trial judge. The Court found that there was sufficient competent evidence to support the finding made by the trial judge. Since the trial judge was not clearly wrong in his finding, the review panel exceeded its authority and the scope of its review. The Court reversed and remanded the case with direction to reinstate the award of the trial judge.



## **2. Carter v. Becton-Dickinson, 8 Neb.App. 900, 603 N.W.2d 469 (1999).**

ARISING OUT OF EMPLOYMENT

RISKS OF EMPLOYMENT

NATURAL RESULT OF PREEXISTING CONDITION

The Court of Appeals affirmed the compensation court's dismissal of plaintiff's claim where sufficient facts existed to find that plaintiff's injury was the natural result of a preexisting condition and not the result of any risk arising out of employment.

Plaintiff sustained a displaced hip fracture while she was walking at work. The plaintiff had been checked by a doctor a few days earlier complaining of groin pain. At trial, two physicians opined that an x-ray taken during that visit had been misread because this x-ray indicated a non-displaced hip fracture. One physician opined that the only way to avoid the natural progression from a non-displaced hip fracture to a displaced one was for the plaintiff to be on a non-weight-bearing status. The Court of Appeals agreed with the compensation court that plaintiff's injury was the result of the natural progression of the preexisting fracture initially caused by the stress of walking six miles a day while suffering from the disease of osteoporosis, and that the final manifestation of that disease process indiscriminately manifested itself while plaintiff was walking at her workplace.

The Court of Appeals distinguished the instant case from *Cox v. Fagen Inc.*, 249 Neb. 677, 545 N.W.2d 80 (1996) wherein the Supreme Court held that an employee who had a prior history of chiropractic treatment to his back injured his back while putting on his coveralls at work. The Supreme Court made it clear in *Cox* that when there is the concurrence of a personal risk, such as a preexisting injury, and an employment risk, the personal risk does not defeat compensability if the employment aggravated, accelerated, or combined with the disease or infirmity to produce the disability. The Supreme Court held in *Cox* that the risk of putting on the coveralls was not an everyday risk and therefore was an employment risk. The Court of Appeals held in the instant case that the single activity of nonstrenuous walking, bearing one's body's weight when an injury occurred, is the epitome of a nonemployment, everyday risk.